

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:) WT Docket No.: 96-41
)
)
LIBERTY CABLE CO., INC.,) File Nos.:
for Private Operational) 70877 WNTT370
Fixed Microwave Service) 708778, 713296 WNTM210
Authorization and) 708779 WNTM385
Modifications) 708780 WNTT555
) 708781, 709426, 711937 WNTM212
New York, New York) 709332 (New)
) 712203 WNTW782
) 712218 WNTY584
) 712219 WNTY605
) 713295 WNTX889
) 713300 (New)
) 717325 (New)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Suite 201, Courtroom 2
FCC Building
2000 L Street, N.W.
Washington, D.C.

Wednesday,
January 15, 1997

The parties met, pursuant to the notice of the
Judge, at 9:32 a.m.

BEFORE: HON. Richard L. Sippel
Administrative Law Judge

APPEARANCES:

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APPEARANCES (continued):

On Behalf of Michael J. Lehmkuhl:

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Michael J. Lehmkuhl	1023	1066 1113 1127			

E X H I B I T S

	<u>IDENTIFIED</u>	<u>RECEIVED</u>	<u>REJECTED</u>
<u>Liberty/Bureau:</u>			
16	1009	1009	
17	1009	1009	

TW/CV:

22	1020	1020
37	1126	1127

Hearing Began: 9:32 a.m.	Hearing Ended: 5:03 p.m.
Recess Began: 11:57 a.m.	Recess Ended: 1:20 p.m.

P R O C E E D I N G S

JUDGE SIPPEL: We have the testimony this morning of Mr. Michael Lehmkuhl. Before we get into that, I would like to -- well, first, let me ask if counsel for either side have anything to raise as a preliminary matter this morning? Anything on documents?

MR. SPITZER: Purely on an administerial matter, Your Honor, we have marked but not yet moved into evidence, obviously, Liberty/Bureau Exhibit 16, Mr. Lehmkuhl's affidavit, which we submitted to the parties yesterday with respect to the -- Monday, rather -- with respect to the documents search. And Liberty/Bureau Exhibit 17, Mr. Barr's affidavit relating to the same issue.

And we would offer these into evidence. What I have asked the court reporter to stamp are identical copies of what we distributed the other day.

JUDGE SIPPEL: Does the reporter have the copies to stamp?

MR. SPITZER: Yes. They have been stamped, Your Honor -- the copies.

JUDGE SIPPEL: All right, then, is there any objection to receiving this into evidence?

MR. BECKNER: No objection, Your Honor.

MR. HOLT: No objection, Your Honor.

JUDGE SIPPEL: Then Liberty/Bureau Exhibits

1 numbered 16 and 17 are identified as you have identified
2 them, Mr. Spitzer, and they are hereby received into
3 evidence as your exhibits number 16 and 17.

4 (The documents referred to
5 were marked for identification
6 and received into evidence as
7 Liberty/Bureau Exhibits 16 and
8 17.)

9 MR. SPITZER: Thank you, Your Honor. With the
10 Court's leave, we will actually make copies of these
11 exhibits so we can give to the parties so they have one
12 stamped copy of them.

13 JUDGE SIPPEL: Oh, that is not necessary.

14 MR. SPITZER: Fine, Your Honor.

15 JUDGE SIPPEL: They have copy. I have a copy. We
16 can write on them.

17 MR. SPITZER: Okay. Thank you.

18 JUDGE SIPPEL: Thank you.

19 MR. SPITZER: Only one other ministerial matter,
20 Your Honor. We would just like to introduce Mr. Gutmann,
21 who is an attorney at the firm of Pepper and Corazzini, who
22 is here because Mr. Lehmkuhl, who is also an attorney at the
23 firm, is going to be testifying. Just to put it on the
24 record.

25 MR. GUTMANN: Your Honor, if it please the Court,

1 I am Peter Gutmann, of Pepper and Corazzini. And I would
2 like to enter an appearance on behalf of the witness,
3 Mr. Lehmkuhl.

4 JUDGE SIPPEL: You are appearing -- well, yes,
5 certainly, your appearance is noted, Mr. Gutmann.

6 MR. GUTMANN: Thank you.

7 JUDGE SIPPEL: I want to be sure I understand, you
8 are here solely to represent Mr. Lehmkuhl in his testimony
9 today?

10 MR. GUTMANN: That is correct, Your Honor.

11 JUDGE SIPPEL: And you are with the law firm of?

12 MR. GUTMANN: Pepper and Corazzini, with which
13 Mr. Lehmkuhl is associated.

14 JUDGE SIPPEL: Okay. All right, I understand
15 Mr. Lehmkuhl's association there. And that is with -- well,
16 I will ask Mr. Lehmkuhl when he gets on the stand.

17 I do not want to take up -- I want to get right to
18 the witness, because we want to continue business. This
19 witness is from Washington, D.C., however, so I would not
20 anticipate going beyond 4:30 p.m. this afternoon, even if we
21 do not complete with this witness.

22 Mr. Gutmann?

23 MR. GUTMANN: Your Honor, I might just add that
24 Mr. Lehmkuhl is serving on a grand jury in the District of
25 Columbia at this time and may not necessarily be available

1 tomorrow at this hearing site. I do not know the facts, but
2 I did want to point out to the Court.

3 JUDGE SIPPEL: Well, that is very appropriate. I
4 would ask that you and Mr. Lehmkuhl do what you can in that
5 regard. But, obviously, if he is under an obligation to
6 appear before -- or, rather, to serve on a grand jury, that
7 would be the same. Certainly, we will work -- you know, we
8 will honor that and we will work around it.

9 MR. GUTMANN: Thank you, Your Honor.

10 JUDGE SIPPEL: I mean, in that case, certainly, if
11 we can complete his testimony at 5:00 or 5:30, rather than
12 have him come back for an hour or two tomorrow morning, we
13 will do that.

14 MR. GUTMANN: Thank you, Your Honor. We
15 appreciate it.

16 JUDGE SIPPEL: Well, thank you for letting me
17 know.

18 I want to go back a little bit to TW/CV -- oh, but
19 before I do that, I was going to say, TWT -- TW/CV Exhibit
20 22 for identification. But is there anything more from
21 Mr. Nourain's search for those documents?

22 MR. BEGLEITER: Well, Your Honor, again, I spoke
23 to Mr. Nourain this morning. He probably just got to work.
24 And we will speak to him sometime during the morning and see
25 what he --

1 JUDGE SIPPEL: Somebody is monitoring that, or
2 that is somehow or the other --

3 MR. BEGLEITER: No, I actually have to monitor it
4 from here. But we will call at the first break.

5 JUDGE SIPPEL: All right. All right, that is
6 fine. As I say, if it is just a few, as I indicated
7 yesterday at your request, if there are just a few documents
8 --

9 MR. BEGLEITER: Right.

10 JUDGE SIPPEL: -- you know, just a few pages, he
11 could fax it right to my office.

12 MR. BEGLEITER: Okay.

13 JUDGE SIPPEL: And we can work on it from here.
14 If it is going to be, you know, voluminous -- 20 pages or so
15 -- I would prefer that you go through Mr. Pettit's firm. I
16 think that, just for logistics, it is going to work a lot
17 better for everybody to do it that way. All right --

18 MR. BEGLEITER: Your Honor, we do have -- and we
19 will hand a courtesy to the other parties -- is a public, ah
20 -- the March 21 public filing that was referred yesterday in
21 the testimony -- it is referred to specifically in
22 Mr. Lehmkuhl's April 28 memo. And that one has a list -- I
23 am not representing to say that Mr. Nourain is talking about
24 -- but it does have a list. And, without even marking it,
25 because I do not know if anybody -- we do not want it in the

1 record, but we will gladly give this public record document
2 to any party that wants it and they can take a look at the
3 list.

4 JUDGE SIPPEL: Now, explain to me a little bit --
5 slow down a little bit. I understand the testimony
6 yesterday with respect to a March 21, 1995, file.

7 MR. BEGLEITER: Right.

8 JUDGE SIPPEL: Am I right, '95, that is the year?

9 MR. BEGLEITER: That is right.

10 JUDGE SIPPEL: Is that the year?

11 MR. BEGLEITER: Yes, '95. That was the emission
12 designator problem of COMSEARCH.

13 JUDGE SIPPEL: Right.

14 MR. BEGLEITER: And then the issue came up
15 yesterday afternoon about whether or not there was any
16 specific list --

17 JUDGE SIPPEL: Right.

18 MR. BEGLEITER: -- which contained those paths
19 that had the emission designator problem.

20 JUDGE SIPPEL: Right.

21 MR. BEGLEITER: So we went back yesterday evening
22 and we looked at the March 21 public record filing, which I
23 am sure all of the parties have. I know the FCC has it.
24 And in that filing, there is a list. So, you know, my
25 suspicion is that that is the list that is -- that list

1 seems to be sufficient, in any event, because it is a list
2 of the buildings for which a modification was filed.

3 But it is right in the document and we will hand
4 it to Mr. Holt and Mr. Beckner, and Mr. Weber, Ms. Power and
5 Mr. Keam right now. And --

6 JUDGE SIPPEL: All right.

7 MR. BEGLEITER: -- we will see if he comes up with
8 something else, but it looks like all those buildings are
9 here.

10 JUDGE SIPPEL: I hear what you are saying.

11 MR. BEGLEITER: Okay.

12 JUDGE SIPPEL: Now, let me ask, Mr. Beckner, do
13 you -- Mr. Holt, do you intend to cross-examine Mr. Lehmkuhl
14 on this?

15 MR. BECKNER: Yes.

16 JUDGE SIPPEL: Well, then, is there some way or
17 other that we can get the process going to get the necessary
18 copies so that we can get it marked and introduced? I mean,
19 it can be a TW/CV exhibit. I do not care who sponsors it,
20 since it is a public record document.

21 But you are going to hand it over to Mr. Beckner
22 now?

23 MR. BEGLEITER: I can give him -- I have four
24 copies. I have one for myself. I do not know if that is
25 going to be sufficient. But I can certainly pass them

1 around to the parties.

2 JUDGE SIPPEL: Well --

3 THE WITNESS: Excuse me, Your Honor, may I have a
4 moment to just discuss this document with --

5 JUDGE SIPPEL: Okay, sure. With Mr. Gutmann?

6 THE WITNESS: Yes. No, with -- with Liberty's
7 counsel.

8 JUDGE SIPPEL: Well, why don't we go off the
9 record and let us see if we can get this straightened out?

10 (Whereupon, the proceeding was briefly recessed.)

11 (Whereupon, the proceeding was resumed.)

12 JUDGE SIPPEL: All right, when Mr. Lehmkuhl takes
13 the stand, we will have him identify it and you can formally
14 place it into evidence on cross-examination. That is fine.
15 That is good. Thank you, Mr. Begleiter.

16 I want to get back, very briefly, to TW/CV 22. Am
17 I correct that that document, although it is dated in, I
18 guess, June of 1995, it relates back to paths that were
19 prematurely activated. And it goes back, in fact, as far as
20 to late 1994?

21 MR. BEGLEITER: Yes, Your Honor.

22 MR. BECKNER: Yes, there are four paths on this
23 list that were activated according to the HDL in, roughly,
24 July of 1994. And this document is, among other things, a
25 request for frequency coordination of those four paths, plus

1 some others.

2 JUDGE SIPPEL: And what it does -- I mean, this
3 document, in effect, plus Mr. Nourain's testimony -- are
4 going to round out the picture in terms of what happened
5 with those particular paths? I mean, taking it down from
6 the beginning of the unauthorized activation, which is on
7 Exhibit A, down through June?

8 MR. BECKNER: Well, yes, I mean the purpose for
9 which I was offering the document was as evidence, in part,
10 of when Mr. Nourain knew that these four paths needed to be
11 licensed. They were unlicensed and there were STAs.

12 JUDGE SIPPEL: Did you intend to ask this witness
13 about those, too?

14 MR. BECKNER: Well, yesterday, you seemed to kind
15 of cut me off in discussing, you know, the events of July,
16 '95, so I kind of put that at the bottom of my list of
17 questions. But, yes, I was going to ask him a couple of
18 things about this. Not any great details, certainly.

19 JUDGE SIPPEL: Well, let us wait until we get back
20 to that. Let us wait until we get to that, then, in
21 connection with his cross-examination, because I am still
22 think through my ruling on that yesterday.

23 MR. BECKNER: Yes.

24 JUDGE SIPPEL: Because if it is all related to
25 what is on Exhibit A -- in other words, the paths that have

1 really been put in issue in this case. And even if it just
2 explains the status of the situation, what was being done to
3 deal with those paths -- even though it goes past the time
4 frame that I am interested in, as it goes into July and I am
5 more interested in April on back --

6 MR. BECKNER: Well, let me just --

7 JUDGE SIPPEL: -- maybe it should come in.

8 MR. BECKNER: One thing, if I might? In the
9 motion for summary decision that Liberty and the Bureau
10 filed, they argued, based on testimony and some documents,
11 that these four paths which were activated in, roughly, July
12 of 1994, had been the subject of frequency coordination
13 requests by Mr. Nourain, which he had made in about June or
14 July of 1994. And there was some documentary evidence in
15 support of that argument which they offered, some faxes back
16 and forth. And Mr. Nourain testified about that in his
17 deposition.

18 Subsequently, of course, those coordinations, if
19 they were done in 1994, I mean, for whatever reason, they
20 did not result in applications being filed in 1994. And
21 when Liberty identified these paths as being operating and
22 unlicensed in 1995, they had, of course, to recoordinate the
23 paths, because a year had passed, and they ultimately filed
24 applications for those paths in July of 1995.

25 The question that I was interested in was when did

1 Liberty know that these four paths were operating and
2 unlicensed, because they were not in the initial group of
3 paths that they told the FCC about in May, in the so-called
4 surreply. And that was the whole purpose that I was using
5 this document, was to try to date back to when it was that
6 Liberty realized that it had four more unlicensed active
7 paths operating, in addition to the 15 that it told the
8 Commission about in May of 1995.

9 And Mr. Nourain's testimony, I think it can fairly
10 be said, reflects that he had that knowledge sometime
11 between -- he mentioned the date of June 16 -- and,
12 obviously, this document is dated June 30 of 1995. So,
13 sometime in that period, he obviously knew that these four
14 paths were unlicensed and were operating.

15 And, again, these are among the paths that are
16 listed on the HDL, Appendix F.

17 JUDGE SIPPEL: Right. Mr. Begleiter, do you want
18 to comment on what he said?

19 MR. BEGLEITER: I think Mr. Beckner, as far as he
20 has gone, is accurate. I would just like to point out a
21 couple of things. It was the subject of -- these four paths
22 -- and the circumstances were the subject of a good part of
23 the depositions. They were discussed in both the joint
24 motion and the joint opposition, at length.

25 Mr. Nourain testified at his deposition and

1 yesterday regarding his understanding.

2 JUDGE SIPPEL: His deposition is in evidence.

3 MR. BEGLEITER: Yes. So, I mean, there is a
4 record here. And as far as -- what was also not discussed
5 by Mr. Beckner is that the STAs that were filed for these
6 paths in July did indicate that they were for unauthorized
7 -- that there was unauthorized transmission. And those STAs
8 have been admitted into evidence.

9 So, you have a pretty complete picture, Your
10 Honor, as to -- and, also, the applications are also in
11 evidence in the Time Warner/Cablevision documents. I do not
12 recall what the numbers are now, but I think Mr. Beckner
13 will agree with me --

14 MR. BECKNER: Yes --

15 MR. BEGLEITER: -- that those are all in evidence.

16 MR. BECKNER: -- both the STAs and the
17 applications, which were filed at different times in July,
18 are already in evidence.

19 JUDGE SIPPEL: All right. Well, I mean, having
20 heard all that -- and, of course, I know Mr. Weber has -- I
21 recall Mr. Weber's comments yesterday, really endorsing that
22 this evidence be received.

23 MR. BEGLEITER: As I say, it is off the point of
24 his deposition -- excuse me, this hearing. And I think that
25 the facts here are really not in dispute.

1 JUDGE SIPPEL: Well, I do not think that this --
2 what I was concerned about yesterday is that this was going
3 to get -- involve a considerable amount of evidence that
4 would be extraneous in the sense that it would be outside
5 the time period that I think is on focus here. But I am
6 convinced now that that is not the case. And I think the
7 purpose of it is rounding out the -- you know, rounding out
8 the story here, plus the observations that Mr. Largo made
9 with respect to -- to the extent that it is relevant to
10 candor, you know, we should consider it.

11 I am going to reconsider my evidentiary ruling
12 yesterday and I am going to receive at this time -- this is
13 TW/CV Exhibit Number 22, the letters from Nourain to Duong
14 -- D-U-O-N-G -- dated June 30, 1995. So, that is now in
15 evidence.

16 (The document referred to was
17 marked for identification and
18 received into evidence as
19 TW/CV Exhibit 22.)

20 MR. BEGLEITER: I am marking that.

21 JUDGE SIPPEL: Okay. We will talk about this
22 probably at the break this morning or at least on or about
23 -- maybe when you come back from lunch. But if we are going
24 to finish this witness today, I want to be thinking of a
25 witness tomorrow. And my thinking is that I am going to, at

1 some point in time before this closes down, I am going to
2 need to hear from Mr. Ontiveros.

3 MR. BEGLEITER: Your Honor, we are producing
4 Mr. Price after Mr. Lehmkuhl.

5 JUDGE SIPPEL: All right, that is up to -- I am
6 not changing your order.

7 MR. BEGLEITER: Yes.

8 JUDGE SIPPEL: I am just simply trying to let you
9 know --

10 MR. BEGLEITER: Okay.

11 JUDGE SIPPEL: -- what is going on in my mind, so
12 that you all can think about it and call your people. You
13 have the option of presenting whoever you want to present in
14 whatever order. I am just letting you know, that is all.

15 MR. BEGLEITER: I do not believe, if Mr. Lehmkuhl
16 takes all day today, that I believe that Mr. Price would be
17 a fairly lengthy witness. Probably go a whole day. So, I
18 am really going to hold most of my mental scheduling. If we
19 are not going meeting on Friday, then I do not think we will
20 finish. It depends a lot on how long Mr. Lehmkuhl
21 testifies.

22 JUDGE SIPPEL: All right.

23 MR. BEGLEITER: But if Mr. Lehmkuhl goes all day,
24 then I am going to have difficulty getting both Mr. Price
25 and Mr. Ontiveros in tomorrow.

1 JUDGE SIPPEL: All right. Well, I was not
2 anticipating that both of them would come in tomorrow. I am
3 simply saying that you started off with your list of
4 witnesses, based on what I was requiring. And we left
5 Mr. Ontiveros out there as a distinct possibility. And
6 then, after hearing Mr. Nourain yesterday, he is moving more
7 from a possibility to an actuality. I have said as much as
8 I can about that right now.

9 Well, at this point time, we have a witness here
10 and I want to get him on the stand and let us get this
11 going.

12 MR. BEGLEITER: Okay, Liberty Cable calls Michael
13 Lehmkuhl to the stand.

14 (Continued on next page.)

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1 Whereupon,

2 MICHAEL J. LEHMKUHL

3 having been duly sworn was called as a witness
4 herein, and was examined and testified as follows:

5 JUDGE SIPPEL: Please be seated. You're being
6 represented here by counsel, is that correct?

7 THE WITNESS: Yes, I am. By Mr. Gutmann.

8 JUDGE SIPPEL: And is this -- is he the counsel of
9 your choice?

10 THE WITNESS: Yes, he is.

11 JUDGE SIPPEL: All right. You may proceed.

12 DIRECT EXAMINATION

13 BY MR. BEGLEITER:

14 Q Mr. Lehmkuhl, could you give your full name to the
15 Court Reporter and spell it please?

16 A Michael J. Lehmkuhl, L-E-H-M-K-U-H-L.

17 Q Can you give me -- give us your home and business
18 address, please?

19 A My home address is 1713 P Street, N.W.;
20 Washington, D.C. 20036. I'm employed at the firm of Pepper
21 & Corazzini; 1776 K Street, Suite 200; Washington, D.C.
22 20006.

23 Q Mr. Lehmkuhl, are you an attorney?

24 A Yes, I am.

25 Q Where -- where are you admitted to practice?

1 A I'm admitted to practice in Wisconsin.

2 Q And when were you admitted to practice?

3 A 1991.

4 Q Are you currently employed at Pepper & Corazzini?

5 A Yes, I am.

6 Q Have you represented Liberty Cable from June 1994
7 to the present?

8 A Yes, I have.

9 Q Tell us, sir, what is your -- your education from
10 college on?

11 A I went to college at the University of Wisconsin,
12 Madison. I graduated in 1987 and I went to Drake University
13 Law School. I received my juris doctorate and master's in
14 mass communications in 1990.

15 Q And have you been employed as a lawyer since law
16 school?

17 A Not for the entire time, no. I was employed by
18 the firm of Goldberg, Godles, Weiner and Wright as a
19 paralegal just prior to moving to Pepper & Corazzini as an
20 attorney.

21 Q Why don't you tell us -- or give us your
22 employment since law school?

23 A I was also --

24 Q If you could start out chronologically.

25 A Okay. Chronologically, I was general counsel to

1 Paine Communications, a multi-media firm owned by my father.
2 I worked at the World Bank here in Washington, D.C., and
3 then with Goldberg, Godles, Weiner and Wright, and then
4 Pepper & Corazzini.

5 Q And what was your position with Goldberg, Godles?

6 A As a paralegal.

7 Q And what was your -- what were your duties as
8 paralegal for Goldberg, Godles?

9 A My duties were to prepare FCC license applications
10 and to do research, assist the attorneys in advising clients
11 on FCC law.

12 Q What kind of licenses did you work on as a
13 paralegal at Goldberg, Godles?

14 A Primarily licenses for earth station facilities,
15 common carrier microwave and private operational fixed
16 microwave.

17 Q And when did you leave Goldberg, Godles?

18 A June of 1994.

19 Q And did you then begin with another law firm?

20 A Yes. I began as an attorney with Pepper &
21 Corazzini.

22 Q And so you began with Pepper & Corazzini in June
23 of 1994?

24 A That's correct.

25 Q And was that your first job as a lawyer for a

1 communications law firm?

2 A Yes, it was.

3 Q What have -- what have your duties been at Pepper
4 & Corazzini?

5 A Primarily to prepare and file FCC applications for
6 various clients and to advise clients on areas of
7 communication law with regard to the FCC.

8 Q In the period from June 1994 to approximately May
9 1995, how many clients did you have?

10 A Approximately 20.

11 Q So Liberty -- and was one of those clients
12 Liberty?

13 A Yes, it was.

14 Q And were you also -- what were your duties with
15 regard to the other clients?

16 A To the other clients, basically advised them on
17 FCC law and to prepare applications and file them.

18 Q And what were your duties for Liberty in this
19 period -- in the period from June of 1994 --

20 A The same.

21 Q -- to now?

22 A To now, the same.

23 Q Is your primary task to prepare and file
24 applications?

25 A Yes, it is.

1 Q In the period of June 1994 to May 1995, did you
2 follow a certain routine procedure for the filing of
3 applications for Liberty?

4 A Yes, I did.

5 Q Was that procedure the same generally for the
6 entire period?

7 A Yes.

8 Q Can you tell me, sir, what kind of licenses did
9 Liberty request?

10 A Liberty requested licenses for their 18 gigahertz
11 private operational fixed service.

12 Q Okay. And what is actually licensed by the -- by
13 the 18 gigahertz licenses?

14 A The 18 gigahertz licenses license the transmit
15 site for the operation and also each microwave path
16 emanating from that transmit site.

17 Q And are these licenses -- is a license necessary
18 for the transmission from a -- for a --

19 A Yes.

20 Q -- path?

21 A Right. Each path is listed on the license as well
22 as the transmit site. So --

23 Q To your knowledge, does the FCC have other
24 authorizations, other than licenses, to permit -- to permit
25 a -- to permit an entity to transmit over a path?